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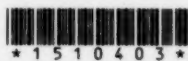
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**Seventh United Nations Conference to Review All Aspects
of the Set of Multilaterally Agreed Equitable Principles and
Rules for the Control of Restrictive Business Practices**
Geneva, 6–10 July 2015
Item 6 (a) of the provisional agenda
Review of application and implementation of the Set

**Model Law on Competition (2015) –
Revised Chapter XIII¹**

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Actions for damages

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

Commentaries on chapter XIII and alternative approaches in existing legislation

Introduction

1. In several countries, competition laws are not only publicly enforced via sanctions imposed by the administering or judicial authority, but also via private actions for damages by individuals or enterprises that have suffered losses from anticompetitive behaviour (private enforcement). The proposed Model Law on Competition provision would give the right to an individual and/or enterprise or the State on their behalf to bring a suit in respect of breaches of law, in order to recover damages suffered, including costs and interest accrued. Such civil action would normally be conducted through the appropriate judicial authority, unless a State specifically empowers the administering authority in this regard.

Efforts to promote private enforcement in well-established competition law regimes

2. The European Union has adopted a directive on rules governing actions for damages under national law for infringements of competition rules. Member States of the European Union have two years to implement this directive in their national legal systems. The directive specifies important substantive and procedural issues such as subject-matter, disclosure of evidence, limitation period and mode of liability. Anyone (e.g. a direct or indirect purchaser or supplier, including consumers) that has suffered harm due to a competition law infringement (articles 101 and 102 of the Treaty on the Functioning of the European Union or national competition law predominantly pursuing the same objective) by an undertaking or an association of undertakings may claim full compensation.

3. Compensation covers actual loss and loss of profits, plus payment of interest. Any participant in a cartel is responsible to the victims for the whole harm caused by the cartel and may pay compensation along with the other infringers. Importantly, this does not apply to small or medium-sized enterprises or to companies that have been granted immunity for bringing the infringement to the attention of the competition authority. These companies only need to compensate purchasers of their own products, unless other infringers are unable to provide full compensation to victims.

4. In order to facilitate follow-on damages actions in antitrust litigations, the Government of the United Kingdom of Great Britain and Northern Ireland has proposed a bill on consumer rights for the consideration of Parliament. The bill provides significant changes, including an extension of the jurisdiction of the Competition Appeal Tribunal, establishment of opt-in collective actions and introduction of voluntary redress schemes.

Forms of private actions for damages

5. Competition law regimes vary with respect to the forms of private actions for damages. Firstly, individual actions need to be distinguished from class actions. In the former, each person and/or company that alleges harm must pursue its own independent

action. That is, only the person who has suffered harm from anticompetitive conduct has standing to file a claim for damages. Following legislation reforms, Germany and Japan now allow greater participation by qualified organizations in filing actions for damages caused by the infringement of competition law. In a class action, a single action may be initiated on behalf of many persons and/or companies alleging harm from the same contravention.

6. Depending on the procedural provisions of a country, persons who are entitled to commence a single action may also transfer their claims to another person, who then has standing to file the claim. Individual actions may be limited to follow-on actions. That is, plaintiffs must wait until a final decision states the anticompetitive conduct before filing a claim for damages resulting from such conduct. This limitation is based on considerations of procedural efficiency and, in a jurisdiction where the competition authority is responsible for prosecuting and sanctioning anticompetitive behaviour, ensures that the civil courts do not assess the conduct in question differently from the way it is assessed by the competition authority. In addition, plaintiffs often prefer follow-on actions, as they need not pay the costs of proving the competition law infringement.

7. Through representative or class actions, a group of plaintiffs collectively brings a claim for damages to court. The rationale for allowing such collective actions in competition matters is twofold. First, each individual claim may be too small to justify separate action and a possibly lengthy court procedure. Second, the class action may significantly reduce the costs of the action for each plaintiff. A class action may be brought on behalf of a class of persons whose identity need not be ascertained when submitting the claim, but the membership of the class must be ascertainable. For example, a class may consist of direct purchasers of cartelized products, while indirect purchasers and end-consumers may form further classes.

8. In most jurisdictions, damages to be obtained by the plaintiff are limited to full compensation of the loss suffered from the anticompetitive conduct, including the costs of the legal proceedings and interest. However, in the United States of America, a plaintiff may benefit from punitive damages, which may amount to triple the actual damage.

Alternative approaches in existing legislation

9. Alternative approaches in existing legislation regarding private actions for damages are detailed in the table.

Country, group or region

Individual actions only

China According to Article 50 of the Anti-monopoly Law, business operators that carry out monopolistic conducts and cause damages to others shall bear civil liability according to law.

The provisions of the Supreme People's Court Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Cases Arising from Monopolistic Conducts (Anti-monopoly Judicial Interpretation), as adopted at the 1539th Session of the Judicial Committee of the Supreme People's Court and issued on 3 May 2012, specify the subject-matter and scope of coverage, jurisdiction, standing to sue, burden of proof, liability, statute of limitations, etc.

Article 1 of the Anti-monopoly Judicial Interpretation indicates that the scope of coverage is monopolistic conduct, including monopoly agreements, abuse of dominant market position and the concentration of

Country, group or region

undertakings. However, abuse of administrative power to eliminate or restrict competition is excluded, since the nature of such litigation is administrative proceedings and abuse of administrative power to eliminate or restrict competition is not monopolistic conduct listed in article 3 of the Anti-monopoly Law.

Regarding standing to sue, article 1 stipulates that natural persons, legal persons and other organizations may file civil lawsuits with the people's courts for disputes over losses caused by monopolistic conduct or violations of the Anti-monopoly Law by contractual provisions, bylaws of industry associations, etc. In light of Article 108 of the Civil Procedure Law, plaintiffs shall have a direct interest in the case. An important test of direct interest is whether immediate losses are caused by monopolistic conduct.

Article 7 provides that in a case of alleged monopolistic agreement as described in article 13.1 of the Anti-monopoly Law, the defendant shall assume the burden to prove that the agreement does not have the effect of eliminating or restricting competition.

Article 8 provides that in a case of abuse of a dominant market position as described in article 17.1 of the Anti-monopoly Law, the defendant shall assume the burden to prove a justification of its conduct.

Article 14 provides that where a defendant's monopolistic conduct has caused any losses to the plaintiff, the people's court may, in light of the plaintiff's claims and the finding of facts, order the defendant to cease infringement and compensate for losses. In addition, according to the plaintiff's claim, the people's court may include the plaintiff's reasonable expenses on investigation and prevention of the monopolistic conduct in the scope of compensation for losses.

South
Africa

Section 65 of Competition Act No. 89, 1998 (as amended) states:

(6) A person who has suffered loss or damage as a result of a prohibited practice: (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49 D (1); or (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form: (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act; (ii) stating the date of the Tribunal or Competition Appeal Court finding; and (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.

(7) A certificate referred to in subsection (6) (b) is conclusive proof of its contents, and is binding on a civil court.

(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.

(9) A person's right to bring a claim for damages arising out of a prohibited practice comes into existence: (a) on the date that the Competition Tribunal made a determination in respect of a

Country, group or region

matter that affects that person; or (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.

(10) For the purposes of section 2A (2) (a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).

Though the Competition Act does not make any specific provision for class actions, in 2013, the Constitutional Court handed down a judgement overturning the judgements of both the High Court and the Supreme Court of Appeal, which effectively refused to allow the applicant harmed by a bread cartel to bring a class action. This case has the potential to set a precedent for class actions.

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| Tunisia | Civil law complements competition law by allowing victims of anticompetitive conduct to file an action for damages with the civil courts. |
| United Kingdom | Companies or individuals who have suffered loss as a result of a breach of competition law may bring an action for damages against the party or parties engaged in the anticompetitive behaviour. Damages actions may either be stand-alone or follow-on from a decision of a regulator. Actions can be brought before either the High Court or the Competition Appeal Tribunal. The Government has brought forward legislation to reform civil litigation procedures to facilitate follow-on damages actions in competition cases by addressing the difficulties faced by claimants. A bill on consumer rights being considered by Parliament is presently at the report stage in the House of Commons, prior to receiving its third reading and being passed to the House of Lords. |
| European Union | <p>Articles 1 and 3 stipulate the subject-matter and scope of the directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union (2014/104/EU, 24 October 2014). Any natural and legal person who has suffered harm caused by an infringement of competition law should be able to claim and obtain full compensation for that harm, which shall not lead to overcompensation. Full compensation shall cover actual loss and loss of profit, plus the payment of interest.</p> <p>Articles 5, 6, 7 and 8 set out the rules of disclosure of evidence. Member States shall ensure that national courts are able to order the defendant or a third party to disclose relevant evidence upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages. However, there are several conditions and limitations concerning the disclosure of evidence, as follows: evidence has to be specified either by item or category and national courts may only grant requests that are proportionate; national courts cannot at any time order a party or a third party to disclose evidence of leniency statements and settlement submissions; and national courts may order the disclosure of evidence prepared specifically for the proceedings of a competition authority only after the competition authority has closed its proceedings.</p> <p>Article 9 states the effect of national decisions. The final decisions of the domestic competition authorities or review courts of member States shall be deemed as irrefutable evidence that an infringement has been committed. Final decisions from other member States will qualify as at least <i>prima facie</i></p> |

Country, group or region

evidence that an infringement of competition law has occurred.

Article 10 stipulates that member States shall ensure that the limitation period for bringing actions for damages is at least five years. The limitation period cannot begin to run before the infringement has ceased and the claimant knows or can reasonably be expected to know the behaviour, the fact that it constitutes an infringement, the fact that this caused the claimant harm and the identity of the infringer.

Article 11 provides that the mode of liability is joint and several liability. However, the directive sets two derogations, as follows: a small or medium-sized enterprise is liable only to its own purchasers where its market share in the relevant market was below 5 per cent and the normal joint and several liability would jeopardize its economic viability; and immunity recipients are liable only to their direct and indirect purchasers. Moreover, the amount of contribution of an immunity recipient may not exceed the amount of harm it caused to its own direct or indirect purchasers or providers, with immunity recipients liable for damages to other injured parties only where full compensation cannot be obtained from the other infringing parties.

Latin
America

Limitations on private cartel enforcement in range from the lack of private rights of action to administrative, procedural, evidentiary and cultural challenges. Three areas that need work are claim aggregation, access to information and judicial or administrative competence.

Possible class actions

Japan

Article 25 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (No. 54, 14 April 1947) states:

1. Any entrepreneur that has committed an act in violation of the provisions of articles 3, 6 or 19 (in the case of entrepreneurs who have committed acts in violation of the provisions of article 6, limited to those entrepreneurs who have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of paragraph 1 of article 8 shall be liable for damages suffered by another party.

2. No entrepreneur or trade association may be exempted from the liability prescribed in the preceding paragraph by proving the non-existence of intention or negligence on its part.

Article 26 states:

1. The right to claim for damages pursuant to the provisions of the preceding article may not be alleged in court until the cease and desist order prescribed in the provisions of paragraph 1 of article 49 (in the case that no such order is issued, the payment order prescribed in paragraph 1 of article 50 (excluding those issued against an entrepreneur that constitutes a trade association that has committed an act in violation of the provisions of item 1 or 2 of article 8)) or the decision set forth in the provisions of paragraph 4 of article 66 has become final and binding.

2. The right set forth in the preceding paragraph shall become extinct by prescription after a lapse of three years from the date on which the cease and desist order or the payment

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order or the decision set forth in the said paragraph became final and binding.

The Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (No. 96, 2013). The Act was promulgated on 11 December 2013 and will take effect within three years from the date of promulgation. The Act covers class actions for damages resulting from a tort committed in conjunction with the conclusion or performance of a consumer contract. The Act enables a special qualified consumer organization to file claims on behalf of consumers for damages arising out of consumer contracts in cases of fraudulent contracts and coerced consumer contracts. It is therefore possible that this new procedure will apply in instances where the imposition of contractual terms on a consumer also constitutes a violation of the anti-monopoly law.

Individual actions and class actions**Australia**

The Competition and Consumer Act provides that a person who suffers loss or damage as a result of cartel conduct can recover the amount of the loss or damage in a private action. Private litigants may also obtain declarations, injunctions and ancillary orders. The Australian Competition and Consumer Commission also has the power to commence representative proceedings on behalf of a group that has suffered loss or damage as a result of cartel conduct. The Federal Court of Australia Act provides a class action regime for private litigants to claim damages resulting from contraventions of the anticompetitive conduct provision of the Competition and Consumer Act. Once a class has been described, every person in that class is assumed to be part of the class unless they decide to opt out of the action by filing a notice with the court in a specified form. Under section 87 (1B) of the Competition and Consumer Act, the Commission has the power to seek damages on behalf of third parties who have suffered damages resulting from contraventions of the anticompetitive conduct provisions of the Act. The parties must opt in by giving their consent to the proceedings on their behalf.

Brazil

The right to bring a civil action to recover damages resulting from a breach of competition law is guaranteed under article 47 of the antitrust law, which states that the injured parties shall be entitled to file action in order to, in the protection of their individual or homogeneous individual interests, obtain the cessation of practices which constitute infringement of the economic order, as well as the receipt of indemnification for the damages sustained, regardless of the inquiry or administrative proceeding, which shall not be stayed by virtue of the filing of the lawsuit. A prior finding by the competition authorities that an infringement has occurred is not required to bring a claim (and such findings do not in any case bind the courts).

Private enforcement action is independent of public enforcement and claims may be brought even where no investigation into the conduct in question has been initiated.

The Public Prosecutor's Office (Federal and state) may file a public class action on behalf of an injured class to obtain compensation for any infringement of competition law, based on the public class action law. The same type of lawsuit may be brought by duly organized associations on behalf of their members. Any association bringing a claim in the general public interest must be at least one year old and have in its institutional objectives the protection of the environment, the consumer, economic order, free competition or touristic, aesthetic, historical and landscape heritage.

Country, group or region

If the Public Prosecutor or an association brings a class action, then the injured parties themselves will not be directly involved in the conduct of the litigation. However, if a party that suffered damage brings its own separate claim for compensation, these actions will be consolidated and addressed as part of the same proceedings.

Germany

According to Section 33 (1) of the Act against Restraints of Competition, whoever violates a provision of the Act, article 101 or article 102 of the Treaty on the Functioning of the European Union or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of the threat of recurrence, to refrain from the conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement.

Paragraph 3 states:

Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to section 287 of the Code of Civil Procedure may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. Sections 288 and 289 sentence 1 of the Civil Code shall apply *mutatis mutandis*.

Paragraph 4 stipulates that, where damages are claimed for an infringement of a provision of the Act or of article 101 or article 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final decision by the cartel authority, the Commission of the European Community or the competition authority or court acting as such in another member State of the European Community. The same applies to such findings in final judgements resulting from appeals against decisions pursuant to sentence 1.

Both chambers of Parliament agreed on the eighth amendment to the Act on 5 June 2013. Industry associations will have standing to bring actions requesting that the infringer cease and desist on behalf of customers or suppliers of the defendant. The amendment also enables consumer protection associations to bring actions for injunctions or to request that the defendant pay economic benefits gained through the infringement to the Federal budget.

United
States

The multiparty litigation in the United States was dramatically transformed by the 1966 amendments to Federal Rule of Civil Procedure 23, which provides the governing framework for class actions today. Rule 23 (a) sets out the four prerequisites for a class action. First, the class must be "so numerous that joinder of all members is impracticable". Second, there must be commonality, meaning there are "questions of law or fact common to the class". Third, there must be a typicality of the claims or defences of the representative parties as compared to the rest of the class. And fourth, the representative parties must "fairly and adequately protect the interests of the class".

Country, group or region

Rule 23 (b) provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.

Rule 23 (c) sets out the class certification process. The court must hold a hearing to determine whether to certify the lawsuit as a class action and an order certifying a class action must define the class and the class claims, issues or defences, and must appoint class counsel.

Rule 23 (e) provides that the court must approve any settlement or other disposition of the matter and direct notice in a reasonable manner to class members. The court, however, must hold a hearing to determine whether the disposition is fair, reasonable and adequate. Class members may object to proposed dispositions that require court approval.

Rule 23 (f) provides that a court of appeals, in its discretion, may permit the appeal of the decision granting or denying class certification. If a class is certified, the court typically must direct to class members the best notice practicable under the circumstances, which must concisely and clearly state in plain, easily understood language the following information: nature of the action; definition of the class certified; claims, issues or defences; ability to opt out and method of opting out of the class; and binding effect of a class judgement on members.

Rule 23 (g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interests of the entire class. In appointing class counsel, the court must consider the work counsel has done in identifying claims in the action, counsel's experience with class actions, other complex litigation and the types of claims asserted in the action, counsel's knowledge of the applicable law and the resources counsel will commit to representing the class.

Rule 23 (h) permits the court to award reasonable attorney's fees to class counsel in a lawsuit certified as a class action. A claim for such an award must be made by motion to the court. A class member may object to a motion for attorney's fees and the court may, in its discretion, hold a hearing to address such a motion.

